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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

◆◆◆◆◆
No. 3
◆◆◆◆◆

FRANCISCO ROMERO,

Petitioner,

against

INTERNATIONAL TERMINAL OPERATING CO., COM-
PANIA TRASATLANTICA; also known as SPANISH
LINE, GARCIA & DIAZ, INC., and QUIN LUMBER CO.,
INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

PETITION OF PETITIONER FOR REHEARING

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Petitioner, Francisco Romero, a disabled seaman, respectfully petitions for rehearing in the above entitled matter.

Statement

Petitioner, a Spanish seaman and member of the crew of the Spanish SS Guadalupe, was tragically injured on board the vessel while it was tied up at Pier No. 2, Hoboken, New Jersey, on May 12, 1954. His injury was due to the unseaworthiness of the vessel and the combined negligence of a miscellany of crewmen and American employees

and agents of three American corporations, including a stevedoring company, a carpentering company, and the agent of the Spanish line.

On motion to dismiss for lack of jurisdiction of the subject matter, the District Court (Hon. Sidney Sugarman, D. J.) conducted a pre-trial jurisdictional hearing and dismissed the complaint with an opinion reported in 142 F. Supp. 570 and 1956 A. M. C. 1579. On appeal, the Court of Appeals affirmed with a *per curiam* opinion reported in 244 F. 2d 409.

This Court granted certiorari, 355 U. S. 807. The case was argued during the last Term and restored to the calendar for reargument, 356 U. S. 955.

On February 24, 1959, the Court rendered its decision vacating the judgment and remanding the case for trial as to the three American corporate defendants, but affirming dismissal as to Compania Trasatlantica, as a dismissal on the merits.

The Court divided 5-4 on the question of jurisdiction of an action based on maritime law under 28 U. S. C. § 1331, the majority holding jurisdiction did not exist under that section; but sustained jurisdiction against Compania Trasatlantica under the Jones Act and "pendent" jurisdiction of the maritime law claims against that respondent, and sustained jurisdiction against the three American corporations by reason of diversity under 28 U. S. C. § 1332. But the Court held, 7-2, that the complaint was properly dismissed as to Compania Trasatlantica, treating the dismissal as on the merits.

In affirming the dismissal on the merits as to Compania Trasatlantica, the majority held the case was controlled by *Lauritzen v. Larsen*, 345 U. S. 571, where the injury was sustained by a seaman on a Danish vessel in Cuban waters and the action was only against the Danish ship-owner for negligence.

Grounds for Rehearing

FIRST: With comparatively little discussion, the Court sustained jurisdiction of the subject matter of the Jones Act claim against Compania Trasatlantica. Mr. Justice Frankfurter stated at page 4 of the opinion:

"Petitioner asserts a substantial claim that the Jones Act affords him a right of recovery for the negligence of his employer. Such assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the Act does provide the claimed rights."

It sustained "pendent" jurisdiction of the maritime law claims also pleaded against that defendant; and sustained diversity jurisdiction under 28 U. S. C. § 1332 of the subject matter of all maritime law claims against the three American corporations.

Hence, it became completely immaterial whether jurisdiction of any of the maritime law claims did or did not exist also under 28 U. S. C. § 1331, and unnecessary, therefore, to decide that question in this case, and more especially by opinions evidencing that on present arguments the Court is divided 5-4 on that question.

The Court unfortunately gave most of its research and attention to the making of a 5-4 decision of the question of whether jurisdiction of maritime law claims exists under 28 U. S. C. § 1331.

But it is most important nationally that this decision, undertaking by 5-4 vote to settle this question for future cases, rather than for its having any effect whatsoever in the case at bar, should not be rested on an unsupported and erroneous premise and conclusions drawn therefrom at variance with and which must overturn fundamental principles respecting the judicial power and jurisdiction early established and hitherto adhered to by this Court.

By a footnote in the majority opinion (footnote 23, p. 13), Mr. Justice Frankfurter, without citation of any supporting authority, states erroneously, as follows, what in reality is the sole premise of subdivision "(b)" of part "I" of the majority opinion:

"All suits involving maritime *claims*, regardless of the *remedy* sought, are *cases* of admiralty and maritime jurisdiction within the meaning of Article III, whether they are asserted in the federal courts or under the saving clause, in the state courts. Romero's *claims* for damages under the general maritime law are a *case* of admiralty and maritime jurisdiction."

(Italics ours.)

From this, Mr. Justice Frankfurter repeatedly charges throughout part "I (b)" that *petitioner* proposes a "design of changing the method" and "demands for a change in the time-sanctioned mode" and "drastic innovation . . . in *admiralty procedure*" (p. 14); a "revolutionary procedural change" (p. 15); "drastic change", "far reaching dislocating construction" (p. 16); "a most far reaching change . . . made subterraneously" for "the infusion of general maritime jurisdiction into the Act of 1875" involving "a disruptive effect on the traditional allocation of power over maritime affairs in our federal system" (p. 17); a "disruption of principle" and "subversion of a principle" which will "eviscerate the postulates of the saving clause" (p. 18); "To give a novel sweep to the Act" (p. 20); "An infusion of general maritime jurisdiction into the 'federal question' grant" (p. 21); "this proposed modification of maritime jurisdiction" (p. 22); "this novel view of the statute" (p. 23); "the effort to infuse general maritime jurisdiction into the Act of 1875", "to extend to cases of admiralty and maritime jurisdiction" "to reconstruct the Act to include cases of admiralty and maritime jurisdiction" (p. 24); "to expand the jurisdiction of the federal courts", "the expansion is proposed, for the first

time" (p. 25); "the proposed infusion of general maritime jurisdiction into the Act of 1875" and "to overturn the existing maritime system" (p. 26).

In footnote 23, page 13, Mr. Justice Frankfurter uses—and well he might—the symbol "Cf." in citing 2 Story, *Commentaries on the Constitution of the United States*, § 1672. For in § 1672, page 504, footnote 2, speaking of those cases in which a concurrent jurisdiction exists under the saving clause, Judge Story states:

"This latter class of cases can be no more deemed cases of admiralty and maritime jurisdiction, than cases of common law jurisdiction."

In the celebrated speech of Mr. Chief Justice Marshall, delivered in the House of Representatives, on the resolutions relative to Thomas Nash, charged with murder committed on a British vessel on the high seas and demanded by that Government under extradition treaty, the distinction between "cases" specified in the Constitution and "questions" specified in the resolutions against which the Chief Justice spoke, it is stated as follows:

"The gentleman from New York had relied on the second section of the third article of the constitution, which enumerates the cases to which the judicial power of the United States extends, as expressly including that now under consideration. Before he examined that section, it would not be improper, to notice *a very material misstatement of it, made in the resolutions* offered by the gentleman from New York. By the constitution, the judicial power of the United States is extended to all *cases* in law and equity, arising under the constitution, laws and treaties of the United States; but the resolutions declare the judicial power to extend to all *questions* arising under the constitution, treaties and laws of the United States. The difference between the constitution and the resolutions was material and apparent. A case in law

or equity was a term well understood, and of limited signification. It was a controversy between parties which had taken a shape for judicial decision.

"But the extension of the judicial power of the United States to all cases of admiralty and maritime jurisdiction, must necessarily be understood with some limitation. All cases of admiralty and maritime jurisdiction which, from their nature, are triable in the United States, are submitted to the jurisdiction of the courts of the United States." (Appendix, 5 Wheat. (15 U. S.) 1, 16, 18.)

This speech is cited, and this same distinction made, in 2 Story's Commentaries on the Constitution, § 1646, pages 485-486. And § 1762, page 570, makes the distinction between "appeal" allowed "in cases of equity and admiralty jurisdiction", in which review was of both facts and law, and a "writ of error" applicable "in suits at common law", and which "removes nothing for reexamination but the law." See also, *The Sarah*, 8 Wheat. (21 U. S.) 391, 395.

In *The Hine v. Trevor*, 4 Wall. (71 U. S.) 555, 569 (1866), this Court states as clearly established that:

"2. The original jurisdiction in admiralty exercised by the District Courts, by virtue of the act of 1789, is *exclusive*, not only of other Federal courts, *but of the state courts also.*" (Italics ours.)

From this we submit that it clearly follows that the true "postulate of the saving clause" is a distinction between "cases of admiralty and maritime jurisdiction" according to whether they are such as must be or properly have been asserted in admiralty, and cases which, though based on claims under the maritime law, are not asserted in admiralty but are properly asserted as cases at law, either on the law side of the Federal courts or in the state courts.

In *Leon v. Galceran*, 11 Wall. (78 U. S.) 185, 191, this Court said:

"the common law is as competent as the admiralty to give a remedy in all cases where the suit is *in personam* against the owner of the property."

When, however, the common law, in its equal competency, gives the remedy which is employed, it is then a case of common law jurisdiction and not a case of admiralty and maritime jurisdiction. Only when the case is either one which must be brought in admiralty or one which, though it might have been brought at law, actually has been brought in admiralty, is it a case of admiralty and maritime jurisdiction. To hold otherwise, as in footnote 23 of Mr. Justice Frankfurter's majority opinion, is to confuse "cases" with "questions" or claims, just as emphasized in the speech of Mr. Chief Justice Marshall above quoted from, and as emphasized by the Chief Justice also in *Osborne v. United States Bank*, 9 Wheat. (22 U. S.) 738, 819. And we respectfully submit that Mr. Justice Frankfurter's footnote 23 is itself an erroneous postulate which, if accepted, will "eviscerate the postulates of the saving clause", as heretofore expounded in this Court, by subterraneously substituting a novel postulate, with disruptive effect on the traditional allocation of power over maritime affairs in our federal system.

The great question here is not whether the postulates of the saving clause are at stake, for in view of Mr. Justice Frankfurter's majority opinion and its footnote 23 they assuredly are. The great question here involved is: *What are the postulates of the saving clause?*

Notwithstanding the great amount of independent research manifest in Mr. Justice Frankfurter's opinion to demonstrate—unnecessarily—the importance of the postulates and how important it is that such postulates be not eviscerated, no research is manifest as to *what those postulates are*.

Mr. Chief Justice Marshall's opinion in *American Ins. Co. v. Canter*, 1 Pet. 511, 544, quoted from on page 10 of the majority opinion herein throws no light thereon. It was, however, decided in 1828, four years following his opinion in *Osborne v. United States Bank*, 9 Wheat. (22 U. S.) 738, 819, and clearly used the word "cases" in the sense expounded in the *Osborne* case and in Mr. Chief Justice Marshall's earlier speech before the House.

It does not support Mr. Justice Frankfurter's footnote 23; and *The Sarah*, 8 Wheat. 391, cited at the conclusion of the quotation on page 10 from *American Ins. Co. v. Canter*, would seem contrary to footnote 23.

Bearing in mind that the decision of the question of jurisdiction under 28 U. S. C. § 1331 was rendered unnecessary when jurisdiction of all claims was sustained on other grounds, it is submitted that part "I(b)" of the majority opinion, and particularly footnote 23 constituting its premise, thus operates to decide by judicial legislation a jurisdictional question of great importance, which should not be thus unnecessarily decided without careful reexamination whether footnote 23—its premise—is sound.

It is respectfully submitted that either part "I(b)" of the majority opinion should be stricken and expunged from the opinion, as dicta and unnecessary judicial legislation, or the whole question of jurisdiction under 28 U. S. C. § 1331, and particularly the soundness of footnote 23, should be reargued.

SECOND: Of greater importance to this petitioner is the majority opinion mandate remanding for further proceedings only against the three American defendants, with a summary judgment on the merits in favor of the fourth defendant, Compania Trasatlantica, thereby unjustly depriving petitioner of valuable rights by barring their examination in any court, without their having been tried and without any motion for summary judgment or judgment on the pleadings having been made or entertained below.

This Court, in accordance with 28 U. S. C. § 2106, has and exercises power on remand to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

This Court, by Mr. Justice Frankfurter, heretofore has said that "the due administration of justice requires that we should exercise our discretionary power in reviewing cases to 'require such further proceedings to be had as may be just under the circumstances', 28 U. S. C. § 2106; *Honeyman v. Hanan*, 300 U. S. 14, 25" (*Skelly Oil Co. v. Phillips Co.* (1949), 339 U. S. 667, 678). In *Kennedy v. Silas Masan Co.* (1947), 334 U. S. 249, 256-257, also cited by Mr. Justice Frankfurter in the *Skelly Oil* case, the Court cautioned that "summary procedures, however salutary where issues are clear and simple, present a treacherous record for deciding issues of far-flung import".

The majority opinion herein, by Mr. Justice Frankfurter, directs that:

"The judgment of the Court of Appeals is vacated and the cause remanded to the District Court for further proceedings not inconsistent with this opinion."

Even if formal mandate were to issue, the opinion of the Court would constitute a part of the mandate whether or not set out in the mandate, in view of the remand "to the District Court for further proceedings not inconsistent with this opinion" (*Gulf Refining Co. v. United States*, 269 U. S. 125 (1925); *Metropolitan Water Co. v. Kaw Valley Drainage Co.*, 223 U. S. 519, 523 (1912)).

Moreover, under Rule 59, paragraph 3, of the Rules of this Court, the opinion of this Court and its judgment are the mandate when a copy is filed below.

Under Rule 58, paragraph 1, timely petition for rehearing may be filed; and under Rule 59, paragraph 2, it is only the filing of a petition for rehearing which will stay the mandate—which otherwise would become law of the case.

The majority opinion herein, by Mr. Justice Frankfurter, in part "II" rules on the merits to "affirm the dismissal of petitioner's *claims* against Compania Trasatlantica; and in part "III" remands for further proceedings only as to the American defendants, Garcia & Diaz, International Terminal Operating Co., and Quin Lumber Co.

There are a number of reasons why the majority opinion as a mandate would operate unjustly—even to the extent of depriving petitioner of the right to have heard in any court valuable rights and questions which the Court apparently has not even considered or taken into account in rendering a judgment which as a mandate would bar their examination.

These rights and questions should be examined now by this Court on rehearing, or the Court's opinion as a mandate should be amended on rehearing to be without prejudice to their full litigation.

In respect particularly to Compania Trasatlantica the majority opinion poses and deals with a series of artificial questions, to decide the merits by judicial legislation instead of by accurate examination of the facts and application of American law thereto.

The great attention to one jurisdictional question, immaterial to the case, but ruled on 5 to 4, is in marked contrast to ruling summarily that principles applied in a case wholly different, party-wise, factually and territorially, will be applied—most artificially, we submit—without examination either of the different applicable principles occasioned by the difference between the cases, party-wise,

factually and territorially, or of the several most significant Jones Act provisions and Committee and Congressional record of its discussion and enactment, including the Congressional declaration of national policy directly opposite to that summarily adjudged in this Court's majority opinion herein. None of which were argued or considered in the cited case *Lauritzen v. Larsen*, 345 U. S. 571 (1953).

The majority opinion makes point to affirm dismissal on the merits of petitioner's claims against Compania Trasatlantica, whether under the Jones Act or under the maritime law of the United States, stating the question as "the narrow issue, whether the maritime law of the United States *may be applied* in an action *involving* an injury sustained in an American port by a foreign seaman on board a foreign vessel in the course of a voyage beginning and ending in a foreign country," and then summarily deciding the different question whether the law imposes on ships "the duty of shifting from one standard of compensation to another as the vessel *passes the boundaries* of territorial waters".

Thereby a tort in a port, participated in by the agents and employees of four corporations, is by the Court summarily altered to one participated in by the employees of three,—a *part* of the participants on the deck. An action by the injured man against the four corporate participants is by the Court summarily altered to an action against three corporate participants. Evidence of the participation of the fourth—an asset to petitioner in an action against all four corporate participants—becomes summarily an asset of the remaining three defendants in an action against them. This upon the theory that "the maritime law of the United States *may (not) be applied*" against the alien corporate participant but may be applied against the three American corporate participants, although the agents and employees of all four were participants therein in a port of the United States. This, by also treating the tort as respects the foreign corporation as though only between it and peti-

tioner and the action as though separately and alone against it.

In *Lauritzen v. Larsen*, party-wise and factually, there was involved a foreign seaman suing only a foreign ship-owner for crew negligence causing injury which occurred territorially in foreign waters.

Here, at the time of Romero's injury, not only was the vessel in an American port; it was manned by a miscellany of foreign crew members and American longshoremen and carpenters, with the American agent in charge, and with the foreign crew members doing work which previously was always profitably done by American labor union members. These facts a trial is needed to establish and clarify, and it is not consonant with the requirements of 28 U. S. C. § 2106 to affirm a dismissal as to one of the four participating corporations before the facts, including the extent and nature of participation of all, have been established by trial.

In *Lauritzen v. Larsen*, there had been a full trial.

Here, the majority opinion is in error, factually, even in its recital in footnote 4 that "The answers of some of the respondents also contained motions to dismiss for failure to state a claim upon which relief can be granted." No answer contains any "motion to dismiss." They plead as an alleged "defense" that the complaint fails to state a cause of action. But the record will be searched in vain for any "motion" either to dismiss for failure to state a claim or for summary judgment.

Today, foreign vessels go into the heart of our country, to Toledo, Chicago, Detroit. If notwithstanding tortious conduct participated in by alien crewmen and American laborers aboard ship while at dock, it is to be ruled that "the maritime law of the United States may (not) be applied" against an alien shipowner, any more than if the vessel were in foreign waters, then the welfare of our country as well as our shipping is jeopardized in a manner

that Chief Justice Marshall, Justice Story and this Court hitherto would not have countenanced. We believe that the Court has not appreciated the vast difference between this case and that of *Lauritzen v. Larsen*.

In *Standard Oil Co. v. Anderson*, 212 U. S. 215, 226, where longshoremen employed by a stevedore, and a winch-man employed by the shipowner worked together on ship-board, the Court said:

“But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos.”

In *Amador v. A/S J. Ludwig Mowinckels Rederi*, 2 Cir., 224 F. 2d 437, 440, cert. denied 350 U. S. 901, the Court, citing *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, held that longshoremen on board a ship were “pro hac vice members of the crew” (224 F. 2d 440).

Here, whether the longshoremen and carpenters were *pro hac vice* members of the Spanish crew or Romero was *pro hac vice* a longshoreman, while topping the booms under the dangerous labor condition which existed on deck, the situation occasioning the injury was certainly a *pro hac vice* situation, and wholly—we repeat, wholly—different from that involved in *Lauritzen v. Larsen*.

The case, therefore, is not one which under 28 U. S. C. § 2106 can properly be disposed of by summarily holding *Lauritzen v. Larsen* “to preclude the assertion of a claim” against Compania Trasatlantica along with the other three corporate tort feasors here.

The majority opinion refers to *Lauritzen v. Larsen* and this case differing only in that Larsen was injured in Havana and Romero “while temporarily in American territorial waters”, and states that “*This difference does not call for a difference in result.*”

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With the situation existing whereby the miscellany of American laborers and alien crew members was working on the deck, and with negligence on the part of employees of all four corporations, the real facts of the case have neither been recited nor passed on by this Court's majority opinion. With the manifest necessity that "there must be cooperation and coordination, or there will be chaos" (*Standard Oil Co. v. Anderson, supra*), which of the two laws must ordain and enforce that cooperation and coordination and indemnity for its violation? To ask the question is to answer it. The American laborers do not become subject to Spanish law upon boarding the Spanish vessel in an American port to do longshore work. Rather the Spanish shipowner is subject to American law as long as his ship in an American port has aboard her the miscellany of American workmen as well as the crewmen—and especially when the crewmen have been ordered to do work which the American workmen are accustomed to do and wish to do for the profitable wage. As shown by what happened, the maintenance of cooperation and coordination by virtue of American law is essential to order and safety.

It was not necessary here to decide whether American law attaches when the ship crosses the border, and is error to decide the question of liability solely by such a test. It is necessary to determine—and this Court has not considered and determined—whether American law applies while a miscellany of American laborers and alien crewmen are working aboard ship under circumstances rendered dangerous thereby, as here, and one of the miscellany is injured as a result.

The Court's opinions herein, moreover, have not even mentioned vital facts such that American policemen and hospital aids took charge when Romero was injured; that at point of death Romero was taken to an American hospital and there treated for nine months; and that the hospital has not been paid a dime for the treatment.

The majority opinion states that liability would be "an onerous . . . burden." Such a burden is borne by the American merchant marine. The public policy declared by the Jones Act, Section 1, now 46 U. S. C. 861, is as follows:

"it is hereby declared to be the *policy of the United States* to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine."

This Court, by its majority opinion, writes an opposite public policy.

The Court has ignored also the significance of the first clause of Jones Act § 33 giving to "Any seaman" *permission to sue*. *Strathearn S. S. Co. v. Dillon*, 252 U. S. 348, argued by ex-Senator, later Mr. Justice Sutherland, had emphasized such a permission to sue as indicating that foreign seamen were to be included; and it was he who suggested the model for Jones Act §33.

These and other features of the Jones Act, argued fully in petitioner's briefs herein, had not been considered by or called to the attention of the Court in the *Lauritzen v. Larsen* case.

It is manifest that the great research and attention expended by the Court upon the question of jurisdiction under 28 U. S. C. § 1331 resulted in the Court's failing to note the great distinctions between this case and that of *Lauritzen v. Larsen*, and that a rehearing is essential for adequate attention thereto.

Finally, if, indeed, the Jones Act is concerned solely with rights of American seamen in the American merchant marine, then *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138, 141-142 (1956) establishes that, since federal law has not preempted the field as respects aliens, State law then can be applied to allow a recovery. The State of New Jersey, where the accident occurred, whose police took

charge of the situation, and one of whose hospitals hospitalized the injured man for nine months and remains unpaid, has a vital interest; and its laws may appropriately be applied. It was New Jersey law which controlled in *Wildenhus' Case*, 120 U. S. 1.

Instead of the case being decided on the merits against petitioner, this Court, under 28 U. S. C. § 2106, should amend its ruling to remand the case to permit petitioner to take such proceedings pursuant to State law as he may be advised. If the Court should hold that in such case jurisdiction at law should be lacking, then, exercising its discretionary powers in such a case, the remand should be for trial as to all respondents in admiralty.

Wherefore, petitioner respectfully prays that a rehearing be granted herein, and that the judgment in favor of respondent, Compania Trasatlantica, on the merits be reversed, and the case be remanded for trial against all respondents. In the alternative, in the event the Court should hold that the case cannot be tried at law as to such respondent, the case should be remanded for trial as to all respondents in admiralty.

Respectfully submitted,

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SILAS B. AXTELL, counsel for the above named petitioner, does hereby certify that the foregoing petition and application is presented in good faith and not for delay.

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